UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.458
3 July 1991

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 458th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 21 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

Article 11 (continued)

Article 13

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.91 26454 0687E
Distr.: 11 July 1991

/...

The meeting was called to order at 2.25 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 11 (continued)

1. The CHAIRMAN said that there had been general agreement in the Commission that there should be a specific reference to amendments in the Model Law. Consequently, he suggested that the following new paragraph be added to article 11, subject to any editorial changes by the Drafting Group: "The principles contained in this article will apply to the amendment of a payment order."

2. Following an indicative show of hands, he noted that most members of the Commission were in favour of the text.

3. Mr. VASSEUR (Banking Federation of the European Community) said he endorsed the Chairman's approach to the problem but wondered if the text would cover all the possible kinds of amendments, not all of which would necessarily take the form of a revocation.

4. For instance, in the case of an originator who wished to increase the amount of a payment order, no revocation would be needed. If, however, he desired to decrease the amendment, the earlier payment order would have to be revoked.

5. The CHAIRMAN said he thought that the proposal would cover all interpretations.

6. Mr. ABASCAL ZAMORA (Mexico) requested that, time permitting, the Commission should consider the adoption of a general rule on interpretation.

7. The CHAIRMAN agreed to that request.

8. He drew attention to the Secretariat's comments on paragraph 3 of article 11 (A/CN.9/346, pp. 65-66) which implied that the paragraph might be redundant. However, the Working Group had considered it useful to retain it and there appeared to be no objection in the Commission to its retention.

9. Inviting the Commission's attention to article 11(4), he recalled that it had decided to make an exception to the authentication rule in article 4(2), (3) and (4) and an amendment to the revocation of payment order provision in article 4(1). It had added the same reference to the revocation order in article 4(4). Since the reference to authentication had already been made, he wondered whether article 11(4) was still needed.

10. Mr. CONOBOY (United Kingdom) said that it had hitherto been considered that the provision in paragraph 4 was a useful one. It was important to remember that there was no provision in the Model Law for a bank to reject a revocation order, whereas, if it had doubts about the authenticity of a

(Mr. Conoboy, United Kingdom)

payment order, it could always reject it. There was thus some merit in retaining the provision.

11. The CHAIRMAN said he wondered whether, if a payment order had been authenticated, a revocation order would have to be authenticated in the same manner.

12. Mr. CONOBOY (United Kingdom) said that, since the Working Group had not wished to insist that the method of authentication should necessarily be the same, paragraph 4 did not prescribe any rule for authentication.

13. Mr. BURMAN (United States of America) said he thought that paragraph 4 should be deleted. However, if the United Kingdom proposal were being considered, his delegation would have to propose an amendment providing that a revocation order must be authenticated if the payment order to which it attached had also to be authenticated. It would be an extraordinary restriction on commercial practice to require that all revocation orders be authenticated when article 4 did not provide that all payment orders had to be authenticated.

14. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that, in view of the important consequences of revoking a transfer, his delegation preferred to retain paragraph 4 as it stood.

15. The CHAIRMAN inquired whether the retention of article 11(4) would be compatible with the change made to article 4.

16. Mr. ABASCAL ZAMORA (Mexico) replied that there was a slight difference in interpretation. He endorsed the view of the United Kingdom representative.

17. He drew the attention of the Drafting Group to a translation error in the Spanish version of article 11(4), which referred to a payment order instead of a revocation order.

18. Mr. GREGORY (United Kingdom) said it was unclear to him why the changes to article 4 made article 11(4) unnecessary.

19. The CHAIRMAN replied that, on the assumption that the same method had to be used for the revocation as for the payment order, article 11(4) was inconsistent with article 4, since authentication was not required for the payment order. However, if the same method was not required, the paragraph could stand.

20. Mr. POTYKA (Observer for Austria) said that he thought the Commission had decided that a handwritten signature would not be considered to be an authentication. He asked whether, if an ordinary customer had signed a payment order and then wished to revoke it, he could do so by sending in a signed order of revocation, even if article 11(4) was retained.

21. The CHAIRMAN, having answered the observer for Austria in the affirmative, asked how many members of the Commission were opposed to the retention of paragraph 4.

22. Mr. BURMAN (United States of America) said that, if the paragraph was amended to make it more flexible, his delegation would be able to accept it, but it still preferred to delete it.

23. Mr. LE GUEN (France) endorsed the United States position that the paragraph should either be deleted or amended to make it more flexible. In that connection, he drew attention to the French Government proposal (A/C.9/347/Add.1, p. 4) that article 11(4) should be redrafted to read: "When a revocation order must be authenticated, this need not necessarily be done by the same method as the payment order."

24. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representatives of the United Kingdom, United States and France. He suggested that the Drafting Group be asked to revise the paragraph to take account of the fact that a revocation order need not necessarily be authenticated in the same way as a payment order.

25. Mr. HUANG Yangxin (China) said that there was a contradiction in that the Model Law did not provide that the payment order must be authenticated. He suggested wording on the following lines: "A revocation order which occurs after a payment order has been authenticated must also be authenticated". If a payment order did not have to be authenticated, a later revocation should not have to be authenticated either.

26. Mr. ABASCAL ZAMORA (Mexico) said that it was necessary to state that the revocation must be authenticated or authorized, to reflect the view of the Working Group that more flexibility with regard to revocation was needed.

27. The CHAIRMAN said that he took it that the members of the Commission agreed that paragraph 4 should be retained and that the Drafting Group should be requested to clarify it, if necessary, on the lines proposed by the French delegation.

28. It was so agreed.

29. The CHAIRMAN, inviting the Commission to consider article 11(5) and (6), recalled that it had been proposed that paragraphs 5 and 6 should be combined. He suggested that the Drafting Group should be entrusted with the task of preparing an appropriate combined text. If he heard no objection, he would take it that the Commission wished to approve paragraphs 5 and 6 on that understanding.

30. It was so decided.

31. Mr. GREGORY (United Kingdom) said that his Government's proposal for a new paragraph to follow paragraph 6 (A/CN.9/347, p. 61) was also related to article 13, since both article 11 and article 13 dealt with a situation in

(Mr. Gregory, United Kingdom)

which there would be a refund either because the payment order or credit transfer had been revoked or because the money-back guarantee had been invoked under article 13.

32. In both articles, the refund was passed backwards along the same chain as the original credit transfer in the forward direction, resulting in the fact that the banks involved in the forward direction were also involved one by one in the opposite direction. His delegation believed that it was unduly restrictive to insist that the refund had to be made in that manner. There might well be circumstances in which a refund could be provided directly to the originator and the Model Law should permit a different route in the backward direction.

33. There might be good reasons why the backward transaction should not take place in the same manner as the forward transaction if, for example, one of the banks became insolvent. Under articles 11 and 13 as currently drafted, if such an incident occurred, the operation of the chain was such that the bank downstream from the insolvent intermediary would have no choice but to pass on the refund to the insolvent bank. That clearly would not be in the interest of the originator, who wished to recover his money.

34. During the Working Group's discussion of the question, one objection to a provision whereby an insolvent bank could be skipped had been that it could interfere with netting arrangements in which the banks involved in the chain were operating. He wished to make it clear that his delegation's proposal would not disturb any netting arrangements and he drew attention to the fact that it began with the words "Without prejudice to obligations under any agreement that nets obligations bilaterally or multilaterally ...".

35. Mr. SCHNEIDER (Germany) said he fully supported the United Kingdom proposal. He recalled the view expressed in the Working Group that all the various types of banking procedures should be covered.

36. Mr. BURMAN (United States of America) said that while his delegation understood the good intentions of the United Kingdom's proposal, it found it unacceptable. It was not realistic to use the expression "without prejudice to" netting systems, while behaving as if they did not exist.

37. In banking transactions that made use of funds transfer systems and engaged in multilateral or bilateral netting, the rights of the parties might change. The United Kingdom approach would not ensure the protection of the rights of the parties, who might in various ways have acquired obligations under a netting system. It should not be forgotten that insolvency provisions were dealt with under very separate legal regimes.

38. Mr. CONOBOY (United Kingdom) said that it was not his delegation's intention to alter insolvency law and he did not believe that its proposal did so. In the real world, one of the banks in the chain might well provide a refund to the originator by simply sending a cheque through the post, thereby avoiding the refund chain of a particular forward transaction.

39. Mr. GREGORY (United Kingdom) said it was true that the existence of netting systems could not be ignored. Under his delegation's proposal, however, a bank was not required to take advantage of the rule in question. In that connection, he drew attention to the statement in the proposal that the bank "is discharged from that obligation to the extent that it makes the refund direct to a prior sender".

40. Not all payments were made through a netting system, and a bank that was properly advised would be able to determine whether there was any risk of a conflict with a netting system. In short, it could take advantage of the rule in circumstances when it deemed it appropriate to do so.

41. Mr. BURMAN (United States of America) said that the United Kingdom proposal would authorize the skipping over of what might be prior and structural arrangements with possible legal implications. In his opinion, a Model Law that authorized a "skip" would not find easy acceptance in the commercial banking world.

42. Mr. DE BOER (Netherlands) suggested that the United States objection to the United Kingdom proposal might be met by amending the beginning of the text to read "Without prejudice to any agreement that nets obligations bilaterally or multilaterally ...".

43. Mr. SCHNEIDER (Germany) said that the Commission was dealing not with insolvency law but rather with substantive law. In his delegation's opinion, it was essential that the funds should be returned to the originator. The point of departure in the Commission had always been that, as a general rule, the idea of netting schemes should be excluded when stating that the originator had a direct claim.

44. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal. While it was true that the Commission was trying to avoid interfering in domestic insolvency law, it was inevitable that the results of its work could have an indirect effect on such laws, which would look to the Model Law to ascertain if money was owed to the insolvent bank.

45. He had some difficulty with the opening words "Without prejudice to its obligations", as he thought that rights should, perhaps, be included as well. The alternative was to make no reference at all to netting agreements which, he agreed, were largely irrelevant. Although money being refunded was thought of as money going back into the system, the fact was that any transaction that had been netted and settled was finished. The refund was a new payment. Most schemes settled daily, so that there was little danger of refunding an unsettled payment.

46. As for the United Kingdom representative's suggestion that a bank might send a cheque to the originator, he was not sure that the words "prior sender" in the proposed text would permit that.

47. Mr. BURMAN (United States of America) said he wished to make sure that his delegation's views on that fundamental and significant topic were clearly understood. The Working Group had discussed and rejected a similar proposal

(Mr. Burman, United States of America)

on the grounds that it was disruptive, so some very strong reason would be required for that decision to be reversed.

48. He was not arguing the merits of the netting system, but endeavouring to contribute to a Model Law which would not be ignored by people using high-volume netting systems. Where there was a "skip rule", there could not be netting and that would mean that the Commission would be cutting itself off from contemporary developments in banking. If such a decision were taken, then his delegation would ask for its views to be inserted as a statement in the final report.

49. Mr. BERGSTEN (Secretary of the Commission) recalled the discussions on somewhat similar lines which had taken place in the Working Group when a similar proposal, referred to as the "skip rule", had been studied. The arguments for fairness were manifest: if a refund had to go back to an insolvent bank, which was responsible for passing it on down the line, that was clearly a serious matter. On that occasion also, the United States delegation had expressed concern about netting arrangements.

50. He had studied the literature relating to article 4A of the Uniform Commercial Code and knew that a proposal on similar lines had been analysed by the Federal Reserve Bank in the United States in the context of CHIPS. In the context of netting through CHIPS, the proposals had not worked. It had been obvious that the matter would be raised again, and it was to be hoped that the United States delegation would make available not just its conclusions, but its background experience, such as the Federal Reserve Bank studies he had mentioned.

51. The Working Group had been well aware of the problems in the case of intercurrency transactions, where netting arrangements might well be in the middle, and it had rejected the proposal.

52. Mr. HEINRICH (Observer, Bank for International Settlements (BIS)) said that, at various meetings of the Commission and the Working Group, BIS had raised a number of matters of concern in regard to netting schemes and its preference that there should be no reference at all to such schemes in the Model Law. The term "netting scheme" was far too vague, the variations in operation from country to country were too great and, for the concept to have any relevance at all, distinctly more than a simple reference would be needed.

53. Mr. GREGORY (United Kingdom) said that he had found the Secretary's intervention very helpful. The discussion taking place in the Commission at the moment did not in fact appear to him to be a replica of that previously held in the Working Group. In the Working Group, the United States delegation had taken the same stand as it was currently doing in the Commission. His own delegation's response at that time had been to hold back, feeling it to be inappropriate to introduce a rule which would not be implemented in the United States.

(Mr. Gregory, United Kingdom)

54. When, at a later stage, it had had an opportunity to study the material supplied by the United States delegation and to consider it in the light of the way banks operated in the United Kingdom, his delegation had come to the conclusion that its proposal was a feasible one.

55. If it would reassure those delegations which thought that the opening words of his Government's proposal were too narrow, they could be revised to read "Without prejudice to any rights and obligations".

56. Mr. SCHNEIDER (Germany) said that the merit of the United Kingdom proposal - which his delegation supported - was the option it offered to a refunding bank to give money back direct to the originator, instead of paying it to the receiver of an insolvent bank. In theory, the originator could work fast to obtain an injunction to stop payment to the insolvent intermediary bank, but he would probably not be quick enough in practice and even then the injunction would confer no legal right to his money.

57. Mr. CRAWFORD (Canada) said that the suggestion that there should be no reference to netting seemed a sensible one. However, if CHIPS could still not function within the Model Law, even without such a reference, that would also make it difficult for him to support the proposal.

58. Mr. CONOBOY (United Kingdom), replying to a question by the CHAIRMAN, said that, if his Government's proposal were rejected, a bank which chose to make refunds under article 11 or 13 in any way other than through the chain would presumably have to rely on the contract-out provision.

59. Following an indicative show of hands, the CHAIRMAN concluded that, while more delegations were in favour of the United Kingdom proposal than opposed to it, a large number of members had not declared themselves either way. He asked the delegations of the United Kingdom and the United States to discuss the issue between themselves in an effort to arrive at a compromise. Failing such a compromise, the United Kingdom proposal would be adopted.

Article 13

60. The CHAIRMAN recalled that many delegations appeared to feel that a scheme of absolute liability was excessively harsh. That was particularly true of the first sentence of paragraph 2, although even the rest of that paragraph was widely thought to be too harsh. In fact, some delegations would be unable to accept the paragraph as a matter of fundamental principle, if no exceptions were provided.

61. Mr. SCHNEIDER (Germany) said he was glad to find that the Commission was prepared to discuss the matter. While he would support all efforts to find a compromise, his delegation had its own proposal to make.

(Mr. Schneider, Germany)

62. The procedure his delegation would prefer involved focusing on the money-back guarantee in its legal environment. It was most important to understand the whole environment in relation to banking supervisory law, to deposit protection schemes and to competition between banks. If the Commission would first study the matter in that way, his delegation would then explain its own proposal.

63. Mr. BERGSTEN (Secretary of the Commission) drew the Commission's attention to a letter he had received from the Secretary of the Basle Committee on Banking Supervision (A/CN.9/347/Add.1, pp. 24-25), which was highly pertinent to its consideration of article 13.

64. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation was far from happy with the principle affirmed in paragraph 1, which it regarded as much too strict and too rigid. The notion of a money-back guarantee was itself open to question.

65. Mr. HEINRICH (Observer, Bank for International Settlements) said that it was his impression from the letter referred to by the Secretary of the Commission that the Basle Committee on Banking Supervision neither approved nor disapproved of the concept of a money-back guarantee.

66. Mr. ABASCAL ZAMORA (Mexico) said that, in the Working Group, it had proved impossible to agree on any exceptions. He would not, in principle, oppose any suggestions in that regard but thought it unlikely that agreement could be reached on possible exceptions. For that reason he was in favour of retaining the article as currently drafted.

67. Mr. SCHNEIDER (Germany) said that the first sentence of paragraph 2 could be retained if provision was made for exceptions.

68. The CHAIRMAN suggested that the first sentence of paragraph 2 might be amended to read "The provisions of paragraph 1 may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the execution of that payment order."

69. Mr. VASSEUR (Banking Federation of the European Community) said that he could go along with the wording proposed by the Chairman on the understanding that, if there was a high level of risk, the originator and his bank had the right to reach an agreement whereby the originator would bear the risk.

The meeting rose at 5.05 p.m.